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IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

NO. _____

WEST GULF MARITIME ASSOCIATION,
Petitioner

-versus-

FEDERAL MARITIME COMMISSION AND
UNITED STATES OF AMERICA,
Respondents

PETITION FOR WRIT OF CERTIORARI
To The United States Court of Appeals
For The District of Columbia Circuit

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QUESTION PRESENTED

Where tariff regulations of ports organized under state law and expressly by statute made subject to its laws are contrary to state law and therefore unlawful under state law, can such regulations be lawfully found to be "*just* and reasonable" under Section 17 of the Shipping Act of 1916 (Title 46, § 816, U.S.C.), and therefore lawful under federal law, contrary to the holding of *Erie Railroad Co. v. Tompkins,* 304 U.S. 64 (1938), that there is no federal common law?

LIST OF PARTIES

West Gulf Maritime Association,
complainant before the Federal Maritime Commission, appellant, and petitioner.

United States of America
Federal Maritime Commission, respondents

Port of Houston Authority
City of Galveston, Texas (Galveston Wharves)
Port of Beaumont, Texas
Port of Port Arthur, Texas
Port of Corpus Christi, Texas
Brownsville Navigation District of Cameron County, Texas
Orange County Navigation and Port District, Texas,
respondents before the Federal Maritime Commission, and joint intervenors in the Court below

Board of Commissioners of the Port of New Orleans, Louisiana
Port of Portland, Oregon
California Association of Port Authorities
Northwest Marine Terminal Association, Inc.
Maryland Port Administration
Virginia Port Authority
Hearing Counsel of Federal Maritime Commission,
intervenors before the Federal Maritime Commission but not before the Court below

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OPINIONS

The Initial Decision of the Administrative Law Judge the Honorable Seymour Glanzer was served September 26, 1979, and is printed in the Appendix, pp. 24-112.

The Order of the Commission Adopting the Initial Decision was served January 28, 1980, and is printed in the Appendix, pp. 16-21. The Commission's Rejection of the Petition for Reconsideration was served March 12, 1980, and is printed in the Appendix, pp. 22-23. None of these is yet officially reported apparently.

JURISDICTION

The judgment of the Court of Appeals for the District of Columbia Circuit was entered on April 2, 1981. No opinion was written. The judgment appears in the Appendix, pp. 113-114.

Jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

A case believed to sustain the jurisdiction is *State of California v. United States,* 320 U.S. 577 (1944).

STATUTORY PROVISIONS INVOLVED

Federal Statutes

Title 46, U. S. Code

Section 801. Definitions

* * *

"The term 'other person subject to this chapter' means any person not included in the term 'common carrier by water', carrying on the business of forwarding or furnishing wharfage, dock, warehouse, or other terminal facilities in connection with a common carrier by water.

* * *"

Section 816. Discriminatory rates prohibited; supervision by Commission.

* * *

"Every such carrier and every other person subject to this chapter shall establish, observe, and enforce just and reasonable regulations and practices relating to or connected with the receiving, handling, storing, or delivering of property. Whenever the Commission finds that any such regulation or practice is unjust or unreasonable it may determine, prescribe, and order enforced a just and reasonable regulation or practice."

Texas State Statutes

V.T.C.A. Water Code, Section 62.078 (Navigation Districts)

(a) "A district established under this chapter may, by and through the commission, sue and be sued in all courts of this state in the name of the district.

(b) "All courts of this state shall take judicial notice of the establishment of all districts."

V.T.C.A. Business and Commerce Code, Section 26.01

"(a) A promise or agreement described in Subsection (b) of this section is not enforceable unless the promise or agreement, or a memorandum of it, is

(1) in writing; and

(2) signed by the person to be charged with the promise or agreement or by someone lawfully authorized to sign for him.

(b) Subsection (a) of this section applies to

* * *

(2) a promise by one person to answer for the debt, default, or miscarriage of another person."

Port Tariff Provisions

These are printed in the Appendix, as follows:

Port of Houston Authority, portions of: Items 2, 3 (App. p. 4).

Port of Galveston (Galveston Wharves), Tariff Circular No. 4-D, portions of: Items 5, 30 (App. p. 5).

Port of Corpus Christi, Tariff No. I-J, portions of: Definitions, Items 15 and 52 (App. p. 10).

Port of Brownsville, Tariff No. 2, portions of: Items 105, 110, 111, 115 (App. p. 13).

Port of Beaumont, Tariff No. 4-H, portions of: Items 100, 105, 115-c, 165 (App. p. 6).

Port of Port Arthur, Tariff No. 1-A, portions of: Items 105, 110-A, 120, 175 (App. p. 7).

Port of Orange, Tariff No. 1-J, portions of: Items 85, 115, 120, 130, 195 (App. p. 14).

STATEMENT

The tariffs of the ports of the State of Texas in language identical in meaning make the agents of vessels calling at those ports personally liable (along with their principals the vessel owners and operators) for all of the charges of the port assessed against those vessels. In addition to these imposed liabilities, the tariffs in like manner obligate the agents to collect for the ports, and be personally liable for, all of the port charges levied against the owners of cargoes transported aboard those vessels.

On behalf of its steamship agent members, the trade association West Gulf Maritime Association complained

to the Federal Maritime Commission that these tariff provisions were not "*just* and reasonable", and therefore were unlawful and invalid, under Section 17 of the Shipping Act of 1916 (46 U.S.C. § 816), which empowers the Commission to abrogate tariff provisions which are not just and reasonable, because the provisions were unlawful by the laws of the State of Texas to which laws these creations of the state were by statute and decision expressly subject.

The Commission found the tariff provisions both lawful and reasonable. The Court of Appeals affirmed. It is respectfully submitted that these holdings disregard the principle of the supremacy of state law set forth in the decision of this Court in *Erie Railroad Co. v. Tompkins*, 304 U.S. 64 (1938).

EXISTENCE OF JURISDICTION BELOW

The jurisdiction of the Commission is founded upon Sections 17 and 22 of the Shipping Act (46 U.S.C. §§ 816 and 821). The jurisdiction of the Court of Appeals is conferred by Title 28, Section 2342, U.S.C.

REASONS FOR GRANTING THE WRIT

The Regulations Complained Of

The port authorities in slightly varying language make the agents which represent the vessels (and the vessel owners and operators) which call at their ports personally liable for the charges levied by the port against those vessels.

The tariff provisions which so impose liability are Houston, Items 2 and 3 (App. pp. 91-92); Galveston, Items 5(t), 30, and 185, 2(c) (App. pp. 94-95, 96); Beaumont, Item 105 (App. p. 98); Port Arthur, Items 110-A and 120(A) (App. pp. 100-101); Corpus Christi, Item 15 (App. pp. 102-104); Brownsville, Items 110 and 111 (App. pp. 105-106); and Orange, Item 120 (App. pp. 107-108).

Going even further, the obligation to collect and be personally liable for the port's charges assessed against cargo carried aboard those vessels is imposed upon the vessel agents. Tariff regulations so providing are: (Corpus Christi, Item 15 (App. pp. 102-104); Beaumont, Item 105 (App. p. 98); Port Arthur, Item 110-A (App. p. 100); Brownsville, Item 110 (App. pp. 105-106); and Orange, Item 120 (App. p. 107). Similar provisions are in the Houston and Galveston tariffs.

Agreement to bear such charges is based on the tariff provisions that agents along with others are "users" of the port facilities, and by such use consent to pay all tariff charges and abide by all tariff provisions. These provisions are: Houston, Items 2 and 3 (App. pp. 91-92); Galveston, Items 5(p) and 30 (App. pp. 94-95); Beaumont, Item 165 (App. p. 99); Port Arthur, Item 175 (App. pp. 101-102); Corpus Christi, Item 52 (App. p. 105); Brownsville, Item 105 (App. p. 105); and Orange, Item 195 (App. p. 108).

By Statute The Ports Are Subject To State Law

The port authorities whose tariff provisions are here at issue operate the port facilities of the State of Texas

pursuant to statutes which created them.* The port facilities of the City of Galveston are owned and operated by that municipality, which is of course subject as such to state law.

The ports, denominated Navigation Districts, have by express statute been made subject to state law, Section 62.078 of the Texas Water Code (Acts 1971, Ch. 58) providing

> "A district established under this chapter may, by and through the commission, sue and be sued in all courts of this state in the name of the district."

The antecedent statute with like wording was construed as subjecting the Brownsville District to suit for torts in *Missouri Pacific R. Co. v. Brownsville Navigation District,* 453 S.W.2d 812 (Tex. S.Ct. 1970).

The Principles Of Agency, Suretyship, And The Statute Of Frauds Are Texas Law And Here Applicable

That an agent is not liable upon the contracts of his disclosed principal is of course Texas law:

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* These statutes are: Houston (Harris County), Acts 1927, 40th Leg., 1st C.S., Ch. 97, page 256; Orange, Acts 1953, 53rd Leg., Ch. 370, page 897; Beaumont (Jefferson County), Acts 1949, 51st Leg., Ch. 147, page 270, as amended Acts 1957, 55th Leg., Ch. 20, page 30, and Acts 1961, 57th Leg., Ch. 6, page 8; Port Arthur (Jefferson County), Acts 1963, 58th Leg., Ch. 197, page 528, and Acts 1967, 60th Leg., Ch. 25, page 47; Galveston, Act of 1955, 54th Leg., Ch. 46, page 71; Corpus Christi (Nueces County), Art. 52 of the Constitution and the General Laws of the State of Texas (222 S.W.2d 404); and Brownsville, Acts 1931, 42nd Leg., Sp. Law, Ch. 3, page 5, and Acts of 1929, 41st Leg., Ch. 192, page 410. Since these statutes are not at issue here, there being no dispute as to the status of the ports, they are not reproduced in the appendix.

> "As a general rule, an agent is not personally liable on a contract entered into by him for the benefit of his principal." 3 Tex. Jur. 3d, p. 223.

In *Heffron v. Pollard*, 73 Tex. 96, 11 S.W. 165 (Tex. Sup. Ct. 1889), it was held

> "If the principal be disclosed, and it appears upon the face of the contract that the agent does not intend to bind himself, the agent is not liable." liable."

As part of its Business and Commerce Code, Texas has enacted the Statute of Frauds, the exact words of the Code being

> "Section 26.01. Promise or Agreement Must be In Writing
>
> "(a) A promise or agreement described in Subsection (b) of this section is not enforceable unless the promise or agreement, or a memorandum of it, is
>
> (1) in writing; and
>
> (2) signed by the person to be charged with the promise or agreement or by someone lawfully authorized to sign for him.
>
> "(b) Subsection (a) of this section applies to
>
> * * *
>
> (2) a promise by one person to answer for the debt, default, or miscarriage of another person;
>
> * * *"

Under the principles of suretyship, a consensual relationship, a surety cannot be held liable unless his undertaking be in writing: An oral agreement to be surety is void in accordance with the Statute of Frauds. *Chickashaw Lumber Co. v. Blanke,* 185 S.W.2d 140 (Civ. App. Ft. Worth, 1945, writ of error ref., want of merit).

The Agents Of Vessels Are Agents For Disclosed Principals

Vessels entering ports must apply through agents for berths, and that such vessels are disclosed principals is established by the decisions in *Hudson Trading Co. v. Hasler & Co., Inc.,* 11 F.2d 666 (S.D. N.Y. 1926), *Instituto Cubano de Estab., etc. v. SS Theotokos,* 155 F.Supp. 945 (S.D. N.Y. 1957), and *Valkenburg, K.-G. v. SS Henry Denny,* 295 F.2d 330 (7 Cir. 1961).

The Agents Have Not Consented To Be Liable Personally

There is here no evidence that the vessels' agents have ever consented *in writing* or in any other manner to be liable personally for the debts of their principals the vessel owners and operators nor of course the debts of owners and shippers of cargoes transported by those vessels.

The port authorities seek to equate actual consent with a fictional consent by providing that use of the port facilities is consent to be bound by all of the tariff provisions.

Of course tariff provisions and the compilance with them do not rest upon consent. Tariff provisions have

the force of law. *Boston & Maine R.R. v. Piper,* 246 U.S. 439, 38 S.Ct. 354 (1918); *Atlantic Coast Line R. Co. v. Atlantic Bridge Co.,* 57 F.2d 654 (5 Cir. 1932); *In re Tidewater Coal Exchange,* 292 Fed. 225 (S.D. N.Y. 1923), aff'd. 296 Fed. 701 (2 Cir. 1924). Ports are public utilities, *Investigation of Free Time Practices —Port of San Diego,* 9 F.M.C. 525 (1966), and the attempt of the ports to make actual consent to be liable for others' obligations out of use of the port facilities (assuming that an agent "uses" facilities furnished to his principal) is a nullity even if not simply a fiction, under the principle of business duress. Acts constituting business duress are unlawful. *W. R. Grimshaw Co. v. Nevil C. Withrow Co.,* 248 F.2d 896 (8 Cir. 1957), cert. den. 356 U.S. 912 (1958), *Smith v. United States,* 153 F.2d 655 (5 Cir. 1946); *McGowen v. Bush,* 17 Tex. 195 (Tex. S.Ct. 1856), *Ward v. Scarborough,* 236 S.W. 434 (Comm. App. Tex. 1922), *Texas Power & Light Co. v. Doering Hotel Co.,* 147 S.W.2d 897 (Austin Civ. App. 1941), aff'd. 139 Tex. 351, 162 S.W.2d 938 (Tex. S.Ct. 1942).

To Be "Just" A Regulation Must Be Lawful

The Maritime Commission is required by Section 17 of the Shipping Act of 1916 to strike down as invalid those regulations of persons subject to the Act which are not "just and reasonable". The ports here are terminal operators and hence subject to the Act. However reasonable a regulation may be, it cannot rightfully nor lawfully be held to be *"just"* if it be unlawful, it is respectfully submitted.

The Commission has itself construed the word "just" as equivalent in meaning to "lawful", holding in *Investi-*

gation of Free Time Practices—Port of San Diego, 9 F.M.C. 525 (1966)

> ". . . As used in section 17 and as applied to terminal practices, we think that *'just* and reasonable practice' most appropriately means a practice, *otherwise lawful* but not excessive and which is fit and appropriate to the end in view." (Emphasis added.)

In *Black's Law Dictionary* "just" is defined as

> "Conforming to or consonant with, what is legal or lawful, legally right, lawful."

A careful contrast between a loose or popular interpretation of the word and its proper legal meaning is set forth in *State v. Several Parcels of Land,* 116 N.W. 682, 684 (Neb. Sup. Ct. 1908), as follows:

> ". . . we are asked to give to the word 'just' its popular meaning of upright, honest, impartial, fair and equitable, rather than its legal interpretation of true, exact, and conformable to law. . . . If we were to adopt that definition, we might inquire into the need for the tax, and into the motives of officers imposing the same. Such a construction would lead us into a world of uncertainty and conjecture. In determining what is just, the judicial branch of the government should not be permitted to question that mass of principles, which, classified and reduced to order by the legislative power and the interpretation of the courts, we call 'the law'. *It is the very essence of the social compact that we should be governed by those principles of justice which are crystallized into law; and in its administration nothing can be said to be just which is unlawful, and nothing unjust that is lawful."* (Emphasis added.)

Under State Law The Regulations Here Are Not "Just", i.e., Are Unlawful

This Court's decision in *Erie Railroad v. Thompkins*, 304 U.S. 64 (1938), dictates that state law should be determinative of whether or not the tariff regulations of these state-created units of government are lawful, that is, "just".

The rightful application of the *Erie* doctrine to the circumstances of this case is clearly set forth in *First Southern Fed. Sav. v. First Southern Sav.*, 614 F.2d 71 (1980), as follows:

> "As demonstrated by its progeny, *Erie* requires (1) that federal law apply in areas of exclusive federal competence, (2) that state law apply in areas of exclusive state competence, and (3) that state law apply in areas of concurrent federal-state competence unless (a) federal legislation or regulation directly addresses the precise and narrow issue of dispute or (b) the application of federal law is required to protect or to effectuate a valid and substantial federal interest or policy. * * * When, as in this case, extensive federal legislation and regulation exist in the area but do not directly address the precise and narrow issue of litigation, the pertinent analysis assesses whether there exists a valid and substantial federal interest or policy that requires the application of federal law as an exercise of interstitial lawmaking to protect or to effectuate the federal scheme. When no such federal interest or policy exists, *Erie* requires that state law apply. See *Miree v. DeKalb County*, 433 U.S. at 28-29, 97 S.Ct. at 2493-2494; *Bank of America National Trust & Savings Association v. Parnell*, 352 U.S. at 33-34, 77 S.Ct. at 121-122."

And of course the decision in *Erie* has received Congressional approval by the enactment of Section 1652, Title 28 U.S.C., which reads

> "The laws of the several states, except where the Constitution or treaties of the United States or Acts of Congress otherwise require or provide, shall be regarded as rules of decision in civil actions in the courts of the United States, in cases where they apply. June 25, 1948, c. 646, 62 Stat. 944."

It is respectfully submitted that here there exists no substantial federal interest or policy that warrants the federal agency to deny the efficacy of state law and substitute its judgment of what is "just" for what the state has determined to be lawful.

CONCLUSION

It is respectfully submitted that the Court of Appeals in upholding the decision of the Federal Maritime Commission has decided a federal question in a way in conflict with applicable decisions of this Court and has decided an important question of federal law which has not been but should be settled by this Court, and that this application for issuance of the writ of certiorari should be granted.

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